Supreme Court, U.S.
FILED
OCT 13 2004
OFFICE OF THE CLERK

No. 03-1454

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL, *ET AL.*
Petitioners,

v.

ANGEL MCCLARY RAICH, *ET AL.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

TIMOTHY LYNCH
ROBERT A. LEVY
MARK K. MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 218-4600

DOUGLAS W. KMIEC*
Counsel of Record
Caruso Chair & Professor
of Constitutional Law
PEPPERDINE UNIVERSITY
SCHOOL OF LAW
Malibu, CA 90263
(310) 506-4255

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, exceeds Congress' power under the Commerce Clause as applied to intrastate possession of marijuana for medicinal use, when that use is undertaken pursuant to physician supervision in accord with California's Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 (West Supp. 2004).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

I. MODERN COMMERCE CLAUSE ANALYSIS SUPPORTS RESPONDENTS 4

A. The Compassionate Use Act Is Within The Province Of Traditional State "Expertise" Over Health Care 4

B. The Compassionate Use Act Does Not Interfere With The Federal Interests Asserted Here 7

C. The Object Of The California Regulation Does Not Qualify As "Commerce" 11

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO ANCHOR MODERN COMMERCE CLAUSE ANALYSIS TO THE ORIGINAL UNDERSTANDING OF THE COMMERCE POWER 15

A. Definitional Formulations Of The Commerce Power, Unattached To The Underlying Constitutional Purpose Of The Power, Risk Slighting State Authority 15

B. John Marshall Opens The Door To A Purpose-Based And Principled Commerce Clause Analysis In *Gibbons v. Ogden* 17

C. The Federal And State Sides Of The Commerce Power Are Best Understood In Relation To The Original Purpose Of The Underlying Virginia Resolution 19

D. Daniel Webster's Argument In *Gibbons* Completes And Explains John Marshall's Analysis — Revealing What Is National And What Is Local 23

E. The Federal Government's Argument Disregards The Purpose Of The Commerce Power And Defies Original Understanding 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **Page(s)**

Barsky v. Bd. of Regents, 347 U.S. 442 (1954) 5

Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001) 8

Brecht v. Abrahamson, 507 U.S. 619 (1993) 28

City of Boerne v. Flores, 521 U.S. 507 (1997) 8

Engle v. Isaac, 456 U.S. 107 (1982) 28

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 2, 7

Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824) ..... *passim*

Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) 4, 5

Gregory v. Ashcroft, 501 U.S. 452 (1991) 28

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 28

Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707 (1985) 4

INS v. Chadha, 462 U.S. 919 (1983) 16

Katzenbach v. McClung, 379 U.S. 294 (1964) 28

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 8

Linder v. United States, 268 U.S. 5 (1925) 4

New York v. United States, 505 U.S. 144 (1992).....8, 13

Ogden v. Gibbons, 17 Johns. 488 (N.Y. 1820) 18

Pegram v. Herdrich, 530 U.S. 211 (2000).....4

People v. Mower, 28 Cal. 4th 457 (2002) 6

People ex rel. Lungren v. Peron, 59 Cal. App. 4th 1383 (1997).....8

People v. Trippett, 56 Cal. App. 4th 1532 (1997).....6, 7

Printz v. United States, 521 U.S. 898 (1997).....8, 13

Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).....11, 12, 13

Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) 27

Sugarman v. Dougall, 413 U.S. 634 (1973).....28

United States v. Darby, 312 U.S. 100 (1941) 13

United States v. Lopez, 514 U.S. 549 (1995) .....*passim*

United States v. Morrison, 529 U.S. 598 (2000).....12, 13

United States v. Rutherford, 442 U.S. 544 (1979).....9

Wickard v. Filburn, 317 U.S. 111 (1942) 13, 14

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8.....16, 21

U.S. Const. amend. X.....27

U.S. Const. amend. XIV.....8

CODES AND STATUTES

21 U.S.C. § 353 9

21 U.S.C. § 355 9

21 U.S.C. § 801 13

21 U.S.C. § 802 12

21 U.S.C. § 812 12

21 U.S.C. § 841 12

21 U.S.C. § 844 12

Cal. Health & Safety Code § 11357.....6

Cal. Health & Safety Code § 11358.....6

Cal. Health & Safety Code § 11359.....6

Cal. Health & Safety Code § 11360.....6

Cal. Health & Safety Code § 11361.5.....6

Cal. Health & Safety Code § 11364.....6

Cal. Health & Safety Code § 11470.....6

Cal. Veh. Code § 13202.5 6

Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5 .....4, 7

H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1 (1970).....12

OTHER AUTHORITIES

1 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1836) 20

2 *The Writings of James Madison* (G. Hunt ed., 1904) 21

21 U.S. 1 (Daniel Webster, for the Plaintiff) 24

61 Ops. Cal. Atty. Gen. 192 (1978) 10

Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since* Lopez: *A Survey*, 32 Cap. U. L. Rev. 671 (2004) 22

Brief for the Petitioners, *Ashcroft v. Raich* (03-1454) ..... *passim*

Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 Pepp. L. Rev. 547 (2001) 19

F. Hayek, 1 *Law, Legislation, and Liberty* (1973) 27

The Federalist No. 11 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 29

The Federalist No. 17 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 28

The Federalist No. 32 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 30

Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1 (1999) 11

Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992) 22

Laura M. Rojas, Comment, *California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients Without Subjecting Themselves to Sanctions*?, 30 McGeorge L. Rev. 1373 (1999) 11

Notes of Debates in the Federal Convention of 1787 Reported by James Madison (W.W. Norton & Co. 1966) 20

"Off-Label Use of Marketed Drugs, Biologics and Medical Devices," *FDA IRB Information Sheet* (1998 Update) 10

Policy 120.988, *AMA Policy Compendium 1996* 8

Proposition Pamphlet, *Argument Against Proposition 215, available at* http://vote96.ss.ca.gov/Vote96/html/BP/215noarg.htm 5

Proposition Pamphlet, *Argument in Favor of Proposition 215, available at* http://vote96.ss.ca.gov/Vote96/html/BP/215yesarg.htm 5

Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) 22

Records of the Debates in the Federal Convention of 1787 as Reported by James Madison 389 (Charles C. Tansill ed., Legal Classics Library 1989) (1927) 20, 25

Report of the Council on Scientific Affairs 3-A-97, *Unlabeled Indications of Food and Drug Administration-Approved Drugs* 10

Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987) 29

Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335 (1934) 21

Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 Notre Dame L. Rev. 507 (1993) 19

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs, including, notably, the *Cato Supreme Court Review*. Counsel of Record for Cato's brief is Professor Douglas W. Kmiec, a leading scholar of constitutional law and recently Dean of The Catholic University of America, who also previously served as Assistant Attorney General of the United States, Office of Legal Counsel, U.S. Department of Justice, during the administrations of Presidents Reagan and George H.W. Bush. The instant case raises squarely the question of the limits on the federal government's power under the doctrine of enumerated powers and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

SUMMARY OF ARGUMENT

The Court of Appeals should be affirmed. Affirmance follows from: the limited, noncommercial and intrastate medicinal use of marijuana authorized by the people of California, the responsible state judicial construction of that

---

[1] In conformity with Supreme Court Rule 37, *amicus* has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. *Amicus* also states that counsel for a party did not author this brief in whole or in part; and no person or entities other than the *amicus*, its members, and counsel made a monetary contribution to the preparation and submission of this brief.

authority, and a reasoned application of the modern Commerce Clause precedents of this Court. Because the terminology of channels, instrumentalities, and substantial effects is subject to over-extension, however, this case is also an appropriate vehicle for linking this useful, but sometimes misused, short-hand to the original understanding of the commerce power. By doing this, the Court will be giving honor to the principles of federalism so well articulated by the late Justice Powell in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting): "In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism."

The ratification bargain is dishonored when citizens in great physical pain are deprived of available medical treatment by a remote sovereign on the far side of the continent. Respect for state authority is abandoned when the only mildly effective therapy for a severe and inoperable illness is mocked in litigation advocacy, as it has been by the federal government here, as a "homegrown" or a "purported" medicinal treatment. Federalism is ignored when, by a thoughtful act of direct state democracy, the neighbors closest to those seeking medical relief overwhelmingly authorize the "compassionate use" of an otherwise controlled substance, but such compassion is then peremptorily denied with a recital of outworn boilerplate about how these acts of federalism "substantially affect" interstate commerce.

Modern Commerce Clause analysis falters when textual definition is separated from constitutional purpose. This is not what the founding generation intended — and this case offers an opportunity to put the original conception of the commerce power back at the core of the Court's thinking. The contours of the original understanding of the commerce power can be gleaned from consideration of three principal sources: (1) Chief Justice John Marshall's seminal opinion in

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); (2) the argumentation of Daniel Webster in that case, which clarifies and completes Marshall's reasoning; and, most importantly, (3) the wording of the Virginia Resolution, which is the genesis of the Commerce Clause. Together, these sources delineate the purpose underlying the commerce power, under which the federal government may act to remedy actual state regulatory incapacity and promote genuinely national interests. The purposive conception of the commerce power yields a workable framework for restraining constitutionally overbroad claims of federal legislative power — one that incorporates, refines, and supplements the best components of the modern Commerce Clause framework.

What is suggested here requires a modest elaboration of the understanding of the commerce power, but one that can do much good: By taking the opportunity to re-connect Commerce Clause analysis to this original understanding, the Court will again make it possible for citizens who depend upon the structure of the Constitution for the preservation of liberty — and, in this case, a life without unbearable pain — to "understand the principle on which this system was constructed."[2]

---

[2] As Founder James Wilson more fully observed:

> I consider the people of the United States as forming one great community, and . . . the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects. . . .
>
> . . . Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed.

James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787), *reprinted in* 1 *The Founders' Constitution* 62 (P. Kurland & R. Lerner eds., 1987).

ARGUMENT

Part I undertakes a brief summary of key arguments in favor of the California statute under modern precedent. As this Part demonstrates, respondents should prevail as a matter of *stare decisis* alone. Part II illustrates how re-connecting existing precedent to the underlying purpose of the commerce power helps avoid the federal over-reaching that is so evident in this case.

I. MODERN COMMERCE CLAUSE ANALYSIS SUPPORTS RESPONDENTS

A. The Compassionate Use Act Is Within The Province Of Traditional State "Expertise" Over Health Care

Justices Kennedy and O'Connor affirmed in *Lopez* that in areas of traditional state concern, where states "lay claim by right of history and expertise," the federal government ought not legislate "beyond the realm of commerce in the ordinary and usual sense of that term." *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., and O'Connor, J., concurring). The Compassionate Use Act, which allows for the limited use of a controlled substance under a doctor's care (Cal. Health & Safety Code 11362.5), fits squarely within an area of state expertise. Protecting the health and safety of citizens has been "primarily, and historically, . . . [a] matter of local concern." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). For this reason, this Court has acknowledged that the local provision of health care is a "subject of traditional state regulation." *Pegram v. Herdrich*, 530 U.S. 211, 237 (2000). Moreover, this Court has stated that "the direct control of medical practice in the States is beyond the power of the Federal Government." *Linder v. United States*, 268 U.S. 5, 18 (1925). It is deep-seated and "elemental" that states retain "broad power" relating to the "establish[ment] and enforce[ment] of standards of conduct within its borders" that facilitates its citizens' health needs. *See Great Atlantic & Pacific Tea Co., Inc v. Cottrell*, 424

U.S. 366, 371 (1976); *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954). This broad power "extend[s] naturally to the regulations of all professions concerned with health." *Id.*

Here, the State of California has exercised its historic power over local health and welfare in a deliberative and circumspect manner. In 1996, California voters, by an overwhelming 56% majority (greater than the vote percentage received by either Presidents Clinton or Bush in the state — and, for that matter, most other elected officials), approved the Compassionate Use Act as Proposition 215. The arguments for and against the proposition were clear and pointed. Doctors and nurses reported witnessing firsthand the medical benefits of marijuana, especially in respect to cancer patients. These medical professionals described how, because of side-effects of certain cancer treatments (for example, nausea induced by chemotherapy), one-third of seriously ill patients discontinue those treatments despite a 50% chance of improvement. By contrast, they argued that when standard anti-nausea drugs fail, marijuana ingested in food or by smoking is often the only medication that eases patients' nausea, permitting continued treatment.[3]

On the other side, opponents of the initiative noted that the federal government allows patients to take Marinol, an FDA-approved synthetic substitute for marijuana. The opponents also argued that the proposition might be the first step toward broader drug legalization. Finally, some members of the law enforcement community (a constituency that was divided on the topic) explained possible enforcement obstacles.[4]

In approving the Compassionate Use Act, Californians balanced these competing concerns, keeping in place tight

---

[3] For a brief summary of positions in favor of Proposition 215, *see* Proposition Pamphlet, *Argument in Favor of Proposition 215, available at* http://vote96.ss.ca.gov/Vote96/html/BP/215yesarg.htm.

[4] For a brief summary of positions against the Proposition, *see* Proposition Pamphlet, *Argument Against Proposition 215, available at* http://vote96.ss.ca.gov/Vote96/html/BP/215noarg.htm.

state controls and prohibitions on marijuana outside the heavily regulated medical context. Mere possession of one ounce or less remains a crime, for example. Cal. Health & Safety Code § 11357(b). Possession with the intent to sell any amount is a felony. Cal. Health & Safety Code § 11359. Non-medicinal cultivation of any amount is a felony. Cal. Health & Safety Code § 11358. Sale, transportation, or distribution of marijuana is a felony under Cal. Health & Safety Code § 11360. There are also provisions specifically outlawing: the sales to minors, Cal. Health & Safety Code § 11361, and the sale or manufacture of marijuana paraphernalia, Cal. Health & Safety Code § 11364. Driving privileges may be suspended for marijuana violations, Cal. Veh. Code § 13202.5, and the forfeiture of vehicles is provided for upon conviction for large amounts, Cal. Health & Safety Code § 11470.

The state judicial construction of the Compassionate Use Act has been equally circumspect. First, in *People v. Mower*, 28 Cal. 4th 457 (2002), the California Supreme Court rejected claims that the Act created an immunity from arrest, either expressly or impliedly. Rather, it recognized a limited immunity from prosecution, which allows a defense at trial, and permits a motion to set aside an indictment or information prior to trial. *Id.* at 470. Thus, a defendant may raise his or her status as a qualified patient or primary caregiver as a defense at trial or in moving to set aside an indictment or information prior to trial. *Id.* at 470-74. The burden of proof as to this affirmative defense is allocated to the defendant. *Id.* at 480-81.

In similarly circumspect fashion, the court in *People v. Trippett*, 56 Cal. App. 4th 1532 (1997), *rev. denied*, 1995 Cal. LEXIS 8225 (Cal. Nov. 15, 1997), reasoned that even with a physician's recommendation or approval, a patient may not possess an unlimited quantity of marijuana under the Act. Rather, the quantity possessed, and the form and manner of its possession, must be reasonably related to the patient's current medical needs. *Id.* at 1549.

In reaching those conclusions, the state court noted that law enforcement authorities had given their support to the proposition because they did not "want to send cancer patients to jail for using marijuana" (*id.* at 1546); but at the same time, the Act carefully provided that "[n]othing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." Cal. Health & Safety Code § 11362.5(b)(2).

B. The Compassionate Use Act Does Not Interfere With The Federal Interests Asserted Here

Against the state's claims to authority, the federal government states a national interest in controlling illicit drug trafficking and promoting safe and effective drug usage. The federal government further asserts that this Court must apply "a 'rational basis' standard that reflects broad deference to legislative judgments regarding whether the intrastate activity at issue" may be federally regulated. Brief of Petitioners at 16 (hereinafter U.S. Brief). These arguments do not withstand scrutiny.

At the outset, the government's unqualified advocacy of "broad deference" to the federal legislature fails to credit the place of federalism in our constitutional system, and this Court's commitment to it. It is reminiscent of an earlier Court's unfortunate consignment of federal-state balance to the vicissitudes of politics. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) ("With the abandonment of *National League of Cities,* all that stands between the remaining essentials of State sovereignty and Congress is the latter's underdeveloped capacity for self-restraint. The problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain.") (O'Connor, J., dissenting). It is far more constitutionally faithful to recognize, as this Court has, that *both* the political

branches *and* the judiciary have an essential role in safeguarding the federal-state balance. "The political branches of the Government must fulfill [this role] if democratic liberty and the federalism that secures it are to endure." *Lopez*, 514 U.S. at 578 (Kennedy, J. and O'Connor, J., concurring).

Nor is the federal government's proposed "rational basis" test consistent with parallel federalism precedents. The federal-state balance is not satisfied by a rational basis inquiry when the federal government improperly commands a state to legislate or enforce federal edict, *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997); or when the federal government imposes monetary liability contrary to principles of state immunity, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). And it also is insufficient to answer whether the federal government has stayed within its enumerated powers.[5] In each of these contexts, the Court applies deference to Congress' legislative purpose but does not apply rational basis deference when determining whether that purpose has been accomplished through an improper invasion of state authority.

Finally, the federal interests asserted by the government as a justification for intruding on state authority are not implicated by the Compassionate Use Act. First, the California Supreme Court has held the Act does not in any way license the introduction of marijuana into the stream of commerce. *People ex rel. Lungren v. Peron*, 59 Cal. App. 4th 1383 (1997), *rev. denied*, 1998 Cal. LEXIS 1321 (Cal.

---

[5] "If Congress could define its own powers [under Section 5 of the Fourteenth Amendment] by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997). Congress should not be permitted to merely define its own power here, either. *See, e.g., id.* at 508 ("Congress does not enforce a constitutional [power] by changing what the [power] is.").

Feb. 25, 1998) (denying even nonprofit associations a defense under the Act, affirming that the Act only gives an affirmative defense to the patient or a patient's primary caregiver from prosecution for cultivation or possession).

Second, California's approval for the limited medicinal use of marijuana presents no interference with the FDA's new drug approval authority. That authority relates expressly to procedures pertaining to introducing a drug into the *interstate* market for sale. 21 U.S.C. §§ 355(a), (b) (2003). This Court's decision in *United States v. Rutherford*, 442 U.S. 544 (1979), sustaining the FDA's authority even as against terminally ill patients, is likewise undisturbed by the medicinal marijuana use here, which implicates no plan for interstate marketing. Acknowledging that the federalist structure of the Constitution reserves at least some components of the relationship between doctor and patient for state oversight is hardly inconsistent with *Rutherford*'s recognition that the FDA has regulatory authority over nationwide marketing of pharmaceuticals.

The acting Solicitor General writes that it is solely for Congress to "constitutionally conclude[] that the public should use only those drugs that the FDA has approved as safe and effective. . . ," U.S. Brief at 27, but FDA practice, itself, denies this unrefined claim of centralized medical direction. The Federal Food, Drug and Cosmetic Act (FDCA) does not flatly prohibit a physician from prescribing or dispensing an unapproved drug outside the bounds of an approved investigational drug study. To the contrary, it explicitly permits a physician, or a pharmacist upon a physician's order, to compound or mix a modified drug product for an identified patient, without obtaining "new drug" approval from the FDA. 21 U.S.C. § 353 (2004). In addition, patients may take, on prescription, an approved medication for an unapproved medical use — a so-called "off-label" prescription. The American Medical Association takes the position that "a physician may lawfully use an FDA approved drug product for an unlabeled indication when such use is based upon sound scientific evidence and sound

medical opinion." Policy 120.988, *AMA Policy Compendium 1996*.[6] The AMA has found this off-label authority to be particularly important in the areas of oncology and rare diseases, like those confronted by respondents. Report of the Council on Scientific Affairs 3-A-97, *Unlabeled Indications of Food and Drug Administration-Approved Drugs*.[7] The federal government's sweeping claim that it has created a highly-regulated "closed-system" with respect to controlled substances is thus contrary to federal law as it exists and as it is practiced.

Third, there is no evidence the Act will interfere with enforcement of preexisting criminal drug policy. To be sure, the federal government has argued that the Act will make it more difficult for law enforcement officials to identify possession of illicit drugs, because they will have to differentiate between cultivation and possession that is legal and that which is not. But, this argument is belied by distinctions law enforcement officers make every day. Law enforcement agents regularly are called upon to differentiate between legal and illegal conduct that manifests itself in largely the same manner. Vicodin and Oxyconton are just two examples of drugs that are available legally under a physician's care, but that are also trafficked illegally on the illicit drug market. One use is subject to prosecution, the other is not. Similarly, in states that have laws that make it legal to carry a firearm, agents must differentiate between legal and illegal gun possession.

---

[6] *See also* "Off-Label Use of Marketed Drugs, Biologics and Medical Devices," *FDA IRB Information Sheet* (1998 Update), *available at* http://www.fda.gov/oc/ohrt/irbs/offlabel.html.

[7] The California Attorney General has opined that the state and federal drug approval laws were intended to protect consumers from drug manufacturers, not to interfere with the physician's judgment regarding individual patient treatment. *See* 61 Ops. Cal. Atty. Gen. 192 (1978).

In this very case, Judge Beam in dissent in the court below doubted "whether anyone can or will seriously argue that the DEA intends to prosecute these two seriously ill individuals," *Raich v. Ashcroft*, 352 F.3d 1222, 1237 (9th Cir. 2003) (Beam, J., dissenting), suggesting that a few individuals with medical needs are fully capable of being disaggregated from the main enforcement tasks of the DEA. Judge Beam cited law review commentary indicating that the DEA generally leaves minor possession cases to state officers. *Id.* at 1237 (Beam, J., dissenting). It would seem that federal law enforcement personnel on the beat have a better, more workable, grasp of the federal-state balance than their federal lawyer counterparts.

It is the federal government's failure to appreciate the federal-state balance that complicates federal law enforcement. As this Court observed in *Lopez*, "[t]he statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., and O'Connor, J., concurring). Indeed, various local counties and police departments in California have already devised means by which to certify patients who are eligible to use marijuana for medical purposes.[8]

C. The Object Of The California Regulation Does Not Qualify As "Commerce"

Congress' power to regulate "commerce" under modern Commerce Clause jurisprudence does not extend to objects

---

[8] In this regard, a certification card in Arcata, California, "contains an identification number that officers in the field can verify by contacting the dispatcher." Laura M. Rojas, Comment, *California's Compassionate Use Act and the Federal Government's Medical Marijuana Policy: Can California Physicians Recommend Marijuana to Their Patients Without Subjecting Themselves to Sanctions*?, 30 McGeorge L. Rev. 1373, 1421 (1999) (noting a similar effort in Marin County).

(*i.e.*, actors, products, or conduct) that fail to exhibit a demonstrated "commercial nexus." *See, e.g., Lopez*, 514 U.S. at 557, 558 (Congress may not use "a relatively trivial impact on commerce as an excuse for broad general regulation of state activities"; rather, "a general regulatory statute" must bear a "substantial relation to commerce") (internal quotations omitted); *id.* at 580 (Kennedy, J., concurring) ("neither the actors nor the commercial character, and neither the purpose nor the design of the statute have an evident commercial nexus"). The activity at issue here — intrastate activity occurring outside the stream of commerce — lacks any such nexus and is therefore beyond the scope of federal legislative power. *See, e.g., United States v. Morrison*, 529 U.S. 598, 611 (2000) ("in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor").

To be sure, marijuana is a federally-controlled substance.[9] Congress enacted the Controlled Substances Act (CSA) "to deal . . . with the growing menace of drug abuse in the United States." H.R. Rep. No. 1444, 91st Cong., 2d Sess. Pt. 1, at 1 (1970). But, as discussed in Parts I.A and I.B

[9] For a summary of the CSA's relevant provisions, *see Raich*, 352 F.3d at 1224:

> The CSA establishes five "schedules" of certain . . . "controlled substances." 21 U.S.C. §§ 802(6), 812(a). Marijuana is a schedule I controlled substance[,] *id.* § 812(c)[,] [based on a finding] (1) that the substance "has a high potential for abuse"; (2) that the substance "has no currently accepted medical use in treatment in the United States"; and (3) that there is "a lack of accepted safety for use of the drug or other substance under medical supervision." *Id.* at § 812(b)(1). . . . Among other things, the CSA makes it unlawful to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as provided for in the statute. 21 U.S.C. § 841(a)(1). Possession . . . is also unlawful. *Id.* § 844(a).

above, the California statutory framework *prohibits* interstate sale, manufacture, or distribution of any drug — and authorizes only the medicinal, intrastate use of marijuana under medical supervision. Furthermore, although Congress, in enacting the CSA, made findings on both interstate and intrastate *manufacturing* and *distribution* of controlled substances and their affects on interstate commerce, Congress made no finding concerning the intrastate, noncommercial cultivation and possession of marijuana for personal *medical* purposes as recommended by a patient's physician. *See* 21 U.S.C. §§ 801(3)-(6). As the court below pointed out, the "limited use [of cannabis in this case] is clearly distinct from the broader illicit drug market — as well as any broader commercial market for medicinal marijuana — insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce." *Raich*, 352 F.3d at 1228.

The federal government here seeks to obscure the intrastate, noncommercial character of the activity at issue by adducing this Court's broadest expositions of the commerce power[10] in *Wickard v. Filburn*, 317 U.S. 111 (1942), and *United States v. Darby*, 312 U.S. 100 (1941); the government, however, pays short shrift to this Court's subsequent *rejection* of the argument that intrastate non-commercial activities are a basis for aggregation under the "substantial effects" test. *Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic . . . conduct based solely on that conduct's aggregate effect on interstate commerce.").[11]

[10] The *Lopez* Court characterized *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. The *Darby* Court's unfortunate trivialization of the Tenth Amendment as little more than a "truism" was unnecessary, unfaithful to the Constitution's structure, and surely was superseded by the decisions of the modern Court. *See New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

[11] While the record in this as-applied challenge demonstrates a complete absence of interstate or intrastate commercial activity, the

Moreover, even assuming *Wickard* and *Darby* apply here, both cases in fact *undermine* the government's case: Both undeniably involved instances of *economic* policy in a way that the activity here, in *Lopez*, and in *Morrison* do not. As the *Wickard* Court observed, the purpose of the regulation in that case "was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Wickard*, 317 U.S. at 128. The home consumption in *Wickard* was thus all about, as the government acknowledges, "Congress's broader regulation of the supply, demand, and prices in the interstate wheat market. . . ." U.S. Brief at 15. The overriding economic considerations behind *Darby* are also likewise apparent. The Court accepted Congress' thinking that goods made in a substandard labor environment could be kept out of the national market. The Court reasoned that the labor conditions needed to be addressed nationally because wages and hours could not be effectively addressed by any single state since the market would naturally produce a price advantage for employers utilizing a lower wage scale.

In short, a faithful application of modern precedent leads to the conclusion that there is no federal "commercial" interest at stake here. Medicinal consumption of home-grown marijuana, administered under a doctor's oversight, pursuant to a validly-enacted statute, is a wholly intrastate activity that: (1) exists outside the stream of (legal or illegal) "commerce" within the meaning even of *Wickard* or *Darby*, and (2) under *Lopez* and *Morrison* cannot be aggregated. Unlike in *Wickard*, the facts at bar demonstrate no attempt to

---

federal government asserts, without any factual basis, that personal medical use of a drug is "economic activity." U.S. Brief at 21. This is unexplained and is far less even than "inference [piled] upon inference." *Lopez*, 514 U.S. at 567.

consume goods that state law would permit to be made available to an interstate market. By comparison, farmer Filburn faced no relevant state law limitation upon the disposition of his wheat crop and was thus legally empowered to frustrate federal objectives. And, unlike in *Darby*, there is no state legal authority to introduce into the *inter*state market goods that the federal government desires to exclude.[12]

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO ANCHOR MODERN COMMERCE CLAUSE ANALYSIS TO THE ORIGINAL UNDERSTANDING OF THE COMMERCE POWER

A. Definitional Formulations Of The Commerce Power, Unattached To The Underlying Constitutional Purpose Of The Power, Risk Slighting State Authority

The analysis in Part I illustrates that the modern Commerce Clause framework favors the respondent and is capable of rendering a result consistent with the intended federal-state balance. However, definitions unattached to the original understanding or purpose of the commerce power are more easily subject to manipulation and error. Thus, the government's primary argument consists of little more than a series of scholastic definitional *assertions* — that personal

---

[12] Again, in wholesale denial of the decision in *Morrison*, the federal government claims that *Wickard* allows Congress to regulate intrastate activity "which itself may not be overtly commercial in nature." U.S. Brief at 15. Here, the federal government confuses the well-established principle that Congress' motivation for regulation is irrelevant with the proposition, rejected in *Lopez* and *Morrison*, that non-commercial acts cannot be aggregated for purposes of substantial effects analysis. The first principle properly keeps the Court out of legislative policymaking. The latter *Morrison* proposition, however, ensures that the Court can meaningfully demarcate federal-state lines of authority. The two inquiries must not be conflated.

medical use of a drug is "economic activity" (U.S. Brief at 21) that is not "overtly commercial," but is nonetheless in aggregate "commercial" enough (U.S. Brief at 15, 21) or "substantial" enough (U.S. Brief at 20) to be counted as "substantially related to" interstate commerce and within the scope of federal authority.

The singular reliance on such conclusory assertions of federal power ought not to be permitted to overwhelm the deeper structural considerations of original understanding that have guided the Court so well elsewhere. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (constraining executive power); *INS v. Chadha*, 462 U.S. 919 (1983) (constraining legislative power). Members of this Court have noted this analytical omission, observing that, of the many structural elements of the Constitution (the separation of powers, checks and balances, and federalism), only with respect to federalism has there been "much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers." *Lopez*, 514 U.S. at 575 (Kennedy, J., and O'Connor, J., concurring).

The Constitution's text is unassailably the locus of interpretative effort, and other short-hand rubrics ("channels," "instrumentalities," "substantial effects") must be understood in a way that is faithful to that text. Justice Thomas has tellingly noted the textual difficulty surrounding the "substantial effects" prong, for example, writing that "[t]he Commerce Clause does not state that Congress may 'regulate matters that substantially affect commerce . . .'"; indeed, "the Framers could have drafted a Constitution that contained a 'substantially affects interstate commerce' clause had that been their objective." *Lopez*, 514 U.S. at 587-88 (Thomas, J., concurring). They did not. Instead, the Framers drafted a Constitution that gave Congress the power "to regulate Commerce . . . among the several States, . . ." U.S. Const. art. I, § 8. The textual meaning of this grant of power is crystallized only when the Clause is interpreted in harmony

with the *purpose* that the Framers intended this grant to accomplish.

That purpose is revealed by examining John Marshall's seminal opinion in *Gibbons v. Ogden*, *supra*; Daniel Webster's oral argument in that case; and the Virginia Resolution, which was the genesis of the Commerce Clause. Together, these sources, examined below, underscore that the Framers granted the commerce power to Congress with an overarching aim: to empower the national goverment to vindicate genuinely national interests — that is, those held by the nation as a whole, such as interstate movement and transportation, communication, or national defense — or to address a commercial subject that cannot be addressed by an individual state without undermining the policies of other states.

Recurring to the Founders' purpose is not an invitation to resurrect the Court's one-time practice of declaring some purposes unacceptable by its own lights. California and the respondents should not prevail in this litigation because a transient majority of the Court thinks the manner in which California has chosen to address the health of its citizens is important or wise. No, California and the respondents should prevail because interpreting the CSA to preclude the Compassionate Use Act does not serve the underlying purpose of the commerce power, and, therefore, no federal enactment can be construed to displace the states and still be faithful to the original understanding.

B. John Marshall Opens The Door To A Purpose-Based And Principled Commerce Clause Analysis In *Gibbons v. Ogden*

The correct analytical approach is made plain by a consideration of Chief Justice John Marshall's decision in *Gibbons v. Ogden*, *supra*. The significance of Marshall's *Gibbons* instruction for discerning the scope of reserved state authority is often overlooked since in that context the purposive inquiry vindicated federal authority. In truth,

however, the guiding originalist principle is the same in either case.

The issue in *Gibbons* was whether a federal law licensing ships to engage in the "coasting trade," under which Gibbons operated, preempted a New York law granting a thirty-year monopoly, held by Ogden, to ply the waters between New York and New Jersey. *See, e.g., Ogden v. Gibbons*, 17 Johns. 488 (N.Y. 1820), *rev'd*, 22 U.S. (9 Wheat.) 1 (1824). The effect of New York's monopoly grant, of course, was to preclude Gibbons from operating under his federal license. In seeking to give the Commerce Clause its full and accurate meaning, Chief Justice Marshall pays attention to the words of the text, but begins his argument with a discussion about how to interpret constitutional text. Thus, he is concerned to avoid not only a "narrow construction, which would cripple the [new federal] government, and render it unequal to the object for which it is declared to be instituted . . . ," but also, and most importantly for the present case, how an "enlarged construction" would slight the reserved sovereign authority of the several states. *Gibbons*, 22 U.S. at 188. Marshall's focus is thus squarely fixed upon the very purpose of the government the Constitution creates. He writes: "If . . . there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given . . . should have great influence in the construction." *Id.* at 188-89. Finally, to the same effect: "We know of no rule for construing the extent of such powers [as the commerce power], other than is given by the language of the instrument which confers them, taken in connexion [sic] *with the purposes* for which they were conferred." *Id.* at 189 (emphasis added).

Clearly, Marshall thinks it important not simply to engage in definitional analysis but to inquire about the "purposes" for which the Constitution's powers, and the Constitution itself, were instituted. Only in this manner, he suggests, will we be able to reach a true "construction" — that is, one that gives due regard to *both* enumerated federal

power *and* reserved state authority. Unfortunately, however, as scholars have pointed out, Marshall short-cuts analysis at this point. *See* Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 Notre Dame L. Rev. 507, 533-37 (1993). Rather than elaborating the complete inquiry, he jumps rather quickly to the conclusion that "commerce" includes navigation, not mere "traffic" or the interchange of commodities. He is correct, of course, but the closest he comes to overtly identifying the functional account of the Commerce Clause is to say that "[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government . . ." *Gibbons*, 22 U.S. at 190. That is true, and important, but it doesn't fully disclose the functional account; for Marshall's use of "objects" here anticipates, but only suggests — without full elaboration — why federal regulation of navigation coincides with the constitutional purpose of the commerce power. Nevertheless, as discussed below, it is obvious that to reach his result, Marshall employed both the text and the purpose underlying the text to fairly consider both the federal *and* state sides of the commerce power.

C. The Federal And State Sides Of The Commerce Power Are Best Understood In Relation To The Original Purpose Of The Underlying Virginia Resolution

To grasp the full import of the commerce power on *both* its federal *and* state side one must necessarily ask: why should the regulation in question come from the federal government? As a matter of original understanding, this can only be made evident by making reference to the Sixth Virginia Resolution of 1787 (Virginia Resolution), from which the commerce power was derived. *See* Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 Pepp. L. Rev. 547, 560-62 (2001). The Virginia Resolution provides:

> [T]hat the National Legislature ought to possess the Legislative Rights vested in Congress by the

> Confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those cases to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.

Records of the Debates in the Federal Convention of 1787 as Reported by James Madison 389 (Charles C. Tansill ed., Legal Classics Library 1989) (1927) (hereinafter Madison's Journal); also found in *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* 380 (W.W. Norton & Co. 1966). Constitutional Convention delegate Gunning Bedford Jr. added the language to legislate for the "general interests of the union," which he explained simply meant to emphasize that states were separately incompetent to legislate on such subjects. Edmund Randolph, Governor of Virginia and chief sponsor of the original "separate incompetence" language, was troubled by Bedford's proposal:

> Mr. RANDOLPH. This is a formidable idea, indeed. It involves the power of violating all the laws and Constitutions of the States, and of intermeddling with their police. The last member of the sentence [regarding interrupted harmony] is also superfluous, being included in the first [regarding general interests].
>
> Mr. BEDFORD. It is not more extensive or formidable than the clause as it stands: no State being separately competent to legislate for the general interest of the Union.

Madison's Journal, *supra*, at 389-90.

Bedford's language carried, over Randolph's objections, and it was this modified vision of legislative power that the Committee of the Whole referred to the Committee of Detail, on July 26, 1787. 1 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 221 (2d ed. 1836). Randolph was on that

Committee, which promptly converted the more broadly worded Virginia Resolution into the specific list of enumerated powers found in Article I, Section 8. Bedford did not object to the replacement of his wording with a specific list of enumerated powers, presumably because the list accomplished all that Bedford had intended. Neither Bedford nor any other Founder intended the Commerce Clause to become a "sweeping clause" that could redraw the federal-state balance upon congressional enactment. As Robert L. Stern has commented:

> Significantly, the Convention did not at any time challenge the radical change made by the committee [of detail] . . . . It accepted *without discussion* the enumeration of powers made by the committee which had been directed to prepare a constitution based upon the general propositions that the Federal Government was "to legislate in all cases for the general interests of the Union . . . and in those to which the states are separately incompetent." . . . This absence of objection to or comment upon the change is susceptible of only one explanation — that the Convention believed that the enumeration conformed to the standard previously approved, and that the powers enumerated comprehended those matters as to which the states were separately incompetent and in which national legislation was essential.

Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335, 1340 (1934).

Even this brief reference to the Virginia Resolution reveals how Marshall was able to so quickly ascertain the scope of federal power in *Gibbons* and how that outcome coincided with Madison's own proposition that the national government was to have "compleat authority in all cases which require uniformity." 2 *The Writings of James Madison* 345 (G. Hunt ed., 1904). Focusing on the Resolution is helpful because it moves the Court beyond the tangled

debates over "commerce," which tend to wax and wane, depending on one's ideology, between plenary power and that strictly necessary to manage the concerns of the eighteenth century. *See generally* Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since* Lopez: *A Survey*, 32 Cap. U. L. Rev. 671 (2004); *see also* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1 (1999) *and* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001). Under the Virginia Resolution, "among the several states" was a synonym for power directed at either vindicating a national commercial interest — that is, one held by the nation as a whole, like interstate movement and transportation, communication, or national defense — or a commercial subject that cannot be addressed by an individual state without undermining the policies of other states.

It may be objected that dividing what is federal from what is local in reliance upon principles of national interest or state incapacity is too vague and manipulable to sustain such division. In the analytical terms of former Stanford Dean Kathleen Sullivan, the effort is too much standard and not enough rule. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58-60 (1992) (noting that rules limit discretion; standards confer it and specifically "tend[] to collapse decisionmaking back into the direct application of the background principle or policy . . . "). There is truth to this objection, but it is a truth that must be confessed about virtually *any* interpretative exercise. The real question is whether reference to the Virginia Resolution assists this Court in the preservation of constitutional structure. The answer is clearly, yes. In this respect, the specific clauses of the Resolution guide judicial inquiry into purpose, asking: (1) whether the states are severally incompetent; (2) whether the harmony of the United States may be interrupted by individual state legislation; and (3)

whether the interest being legislated affects the "general interests of the Union."

D. Daniel Webster's Argument In *Gibbons* Completes And Explains John Marshall's Analysis — Revealing What Is National And What Is Local

The prevailing counsel in *Gibbons* was Daniel Webster, who explained vividly how the "general interests of the Union" in navigation were being undermined in the waters surrounding New York City in 1824. Argued Webster:

> By the law of New-York, no one can navigate the bay of New-York, the North River, the Sound, the lakes, or any of the waters of that State, by steam vessels, without a license from the grantees of New-York, under penalty of forfeiture of the vessel.
>
> By the law of the neighbouring State of Connecticut, no one can enter her waters with a steam vessel having such license.
>
> By the law of New-Jersey, if any citizen of that State shall be restrained, under the New-York law, from using steam boats between the ancient shores of New-Jersey and New-York, he shall be entitled to an action for damages, in New-Jersey, with treble costs against the party who thus restrains or impedes him under the law of New-York! This act of New-Jersey is called an act of retortion against the illegal and oppressive legislation of New-York; and seems to be defended on those grounds of public law which justify reprisals between independent States.
>
> It would hardly be contended, that all these acts were consistent with the laws and constitution of the United States. If there were no power in the *general* government, to control this extreme belligerent legislation of the States, the powers of

> the government were essentially deficient, in a most important and interesting particular. . . .

22 U.S. at 4-5 (Daniel Webster, for the Plaintiff) (emphasis added).

It is instructive that Webster spent little time trying to do what the federal government belabors in its briefing in this case; namely, merely asserting that something is "commerce," or an activity that substantially affects it. Webster termed it vain to look for a precise or exact definition. That, he said, was not the way the Constitution proceeded. Instead, the extent of the power was to be measured by its object. And what was the object or prevailing purpose of the commerce power? To rescue (Webster's word) the general Union from "the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law." *Id.* at 11 (Daniel Webster, for the Plaintiff).

Webster did not envision a commerce power without limit. Indeed, the commerce power was not to consume the state's separate sovereignty; rather, the Court was to interpret the power to keep the interests of the two governments "as distinct as possible. The general government should not seek to operate where the states can operate with more advantage to the community; nor should the states encroach on ground, which the public good, as well as the constitution, refers to the exclusive control of Congress." *Id.* at 17 (Daniel Webster, for the Plaintiff).

With reference to the Virginia Resolution and Webster's argumentation based upon it, the enigmatic nature of Chief Justice Marshall's opinion in *Gibbons* is completed and given clarity. Now it is obvious why Marshall could so easily construe commerce to include navigation, which on its face to every first year law student seems a non sequitur to commerce. The obscurity drops away when navigation is linked not to commercial activity *per se*, but to an interest that must be held by the union of the states in order to avoid

imperiling national interests. Indeed, Marshall's decisional words directly connect the concerns of the Virginia Resolution to the scope of the commerce power, and in so doing state a faithful constitutional understanding of both the federal and state sides of the commerce power. He wrote:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States *generally*; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

Gibbons, 22 U.S. at 195 (emphasis added).

E. The Federal Government's Argument Disregards The Purpose Of The Commerce Power And Defies Original Understanding

John Marshall put into Supreme Court opinion what Gunning Bedford, Jr. meant when he said, "[N]o state [is] separately competent to legislate for the general interest of the Union." Madison's Journal, *supra*, at 362. Without this grounding in original understanding, we forget this principled limitation. A "national interest" is not synonymous with simply a "very important" political topic, as the argumentation of the acting Solicitor General's brief would have this Court believe. His reliance on the cumulative or substantial effects element alone obscures, rather than illuminates, the principle of the Virginia Resolution. In so doing, he is unfaithful to the original understanding and, in this instance, the power reserved to the states. In a different case, disregarding the purposive base of the Virginia Resolution might understate federal interests. To ask whether an individual action "substantially affects" interstate

commerce, without reference to the purpose of the granted power, is to ask an incomplete question.

A principled inquiry, by contrast, seeks to identify the presence or absence of a commercial interest that can only be claimed by the nation as a whole or that must be addressed nationally because of demonstrated state incapacity. And demonstrated state incapacity must be theoretically as well as *practically* grounded, not merely rhetorically asserted. In this respect, incapacity should mean that an individual state's regulatory activity would actually be defeated by the competing regulatory policies of other states.

A standard informed by the Virginia Resolution facilitates sorting that which is national from that which is local and better grounds the Court's modern commerce decisions. In *Morrison*, for example, the federal government insisted that "substantial effect" could be found in relation to the voluminous congressional record on gender-based violence. But there, fidelity to original understanding was not measured by the page, but with an assessment of whether the "general interests of the Union" necessitated a federal cause of action for intrastate rape. Despite the mountainous congressional testimony, there was no principled reason why individual states could not adopt rape shield laws or harsher civil or criminal penalties for violent assaults on the basis of gender animus. Citizens migrate where personal safety is better secured, not the converse. So, too, one would expect citizens to be attracted to states exhibiting a reasoned interest in their personal health and respect for individual medical judgment. As a general matter, citizens migrate toward greater freedom, and acknowledging the state side of the commerce power will often sharpen state competition for economic freedom, which can be easily deadened by unwarranted federal intrusion.[13]

---

[13] Since commerce is mostly a private sector matter, with government enforcing the rules, there is no reason to suppose that the federal government should do so. Under our common law system, most of the rules of commerce began as informal customs or conventions. They evolved over centuries and have simply been "recognized," and sometimes modified, by courts and legislatures as the need arose. *See* F. Hayek, 1 *Law, Legislation, and Liberty* 72-93 (1973). Under our system of limited government, therefore, there is a strong presumption that people can regulate their own affairs, and that government is necessary only when that presumption fails, leading to a case or controversy that is brought before a court. The Tenth Amendment provides that the "powers not delegated to the United States . . . are reserved to the States respectively, *or to the people*." U.S. Const. amend. X (emphasis added).

The same reasoning makes this case straightforward. There is no evidence that California's regulatory policy in any way defeats parallel regulatory activity in another jurisdiction — state or federal. To the contrary, as discussed at length in Section I.A, the California statute prohibits and criminalizes any activity that would implicate interstate trade of banned substances. As a matter of original understanding, states are more, not less, competent to regulate the health interests of their individual citizens. Instead of posing intractable questions about what does and does not substantially affect interstate commerce, the purposive, originalist inquiry asks a practical question: Does the state's regulatory scheme demonstrably act to defeat the regulatory regimes of other states or an interest held by the nation as a whole?

Some problems, of course, are national. Yet, in that case too, anchoring commerce power analysis upon the Virginia Resolution clarifies, for it suggests that trans-boundary air and water resources, for example, may be protected on a national level. The federal government has that power so long as the Congress sufficiently identifies that its legislative interest is a type of migratory resource that is inherently plagued by conflicting regulatory schemes. *Cf. Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173-74 (2001) (finding the federal interest not precisely identified, but suggesting it could be). Air and water resources rarely inhabit one state. It is the common nature of the resource that makes many questions involving

these resources collapse into a costly and wealth-minimizing regulatory war between conflicting state jurisdictions, absent a national solution. Similarly, Congress' power to remedy discrimination on the basis of race is not obviated by the Virginia Resolution. Federal laws banning discrimination at public accommodations, such as motels and restaurants, vindicate a constitutional interest (racial nondiscrimination) legally held by the nation as a whole. That national interest need not rest upon awkward inquiries into the quantities of goods and services held in trade. *Cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). In the case at bar, by contrast, there is — to paraphrase Daniel Webster — no *demonstrated* state incapacity, no *demonstrated* federal-state conflict, and no *general* interest of the union at stake. California should remain free to experiment within the bounds of its regulatory competence.

It should not be surprising that a return to constitutional purpose does not deny the "practical realities" of the twenty-first century, even as it supplies a healthy reminder of the states' primary role in the definition of crime. In *Federalist* No. 17, Hamilton writes: "There is one transcendant [sic] advantage belonging to the province of the State governments . . . I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment." *The Federalist* No. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Moreover, returning to a principled definition of the commerce power echoes the Court's own assessment that "[t]he States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). This is profoundly related to political accountability. The "formation, execution, or review of broad public policy . . . go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (cited in *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991)). The direct and primary

political accountability reserved for the states would become illusory, however, "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities." *Lopez*, 514 U.S. at 577 (Kennedy, J., and O'Connor, J., concurring).

CONCLUSION

The federal government cannot sustain the application of the CSA to the noncommercial, intrastate use of medicinal marijuana under the California Compassionate Use Act. This becomes apparent the moment the Court reflects fully upon the Virginia Resolution and why the people of America gave the federal government power over interstate commerce (which was indeed one of their primary reasons for adopting a new constitution).

The same answer also can be partly gleaned from the "dormant" or "negative" Commerce Clause cases that vindicate federal interests against state protectionist barriers to the free flow of commerce. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1389 (1987). In *Federalist* No. 11, Hamilton remarked that the states had "fettered, interrupted and narrowed" commerce. *The Federalist* No. 11, at 90 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Under the new plan, he continued, "[a]n unrestrained intercourse between the states themselves will advance the trade of each, . . . [and] [t]he veins of commerce in every part will be replenished from a free circulation of the commodities of every part." *Id.* at 89. Justice Johnson made the same observation in his concurrence in *Gibbons*: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons*, 22 U.S. at 231 (Johnson, J., concurring).

But the dormant Commerce Clause captures only the federal side of the commerce power. The Virginia Resolution in full supplies the missing analytical means to

vindicate state interests when the "general interests of the union" are not implicated or the "states are not separately incompetent" to act. When both federal and state interests are harmoniously honored, the original understanding is once again revealed. And by this revelation, the modern Court keeps faith with the arguments for the Constitution's ratification, which cannot be too often remembered.

Even before the Tenth Amendment was added to the Constitution, its point was articulated by Hamilton in *Federalist* No. 32: "the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor . . . is clearly admitted by the whole tenor . . . of the proposed Constitution." *The Federalist* No. 32, at 201 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

California remains "in full vigor" of the power to address the individual health needs of her citizens.

Respectfully submitted.

TIMOTHY LYNCH
ROBERT A. LEVY
MARK K. MOLLER
THE CATO INSTITUTE
1000 Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 218-4600

DOUGLAS W. KMIEC*
Counsel of Record
Caruso Chair & Professor of Constitutional Law
Pepperdine University School of Law
Malibu, CA 90263
(310) 506-4255

Counsel for Amicus Curiae

October 13, 2004